may file with the Board his objections, if any, to such interrogatories, together with any cross-interrogatories he desires to propose. If he file cross-interrogatories, they shall be filed with the Board in triplicate and one copy thereof will be forwarded to the opposite party, or his counsel, who shall within 10 days thereafter file his objections, if any, to such cross-interrogatories. No objections to the interrogatories or cross-interrogatories will be considered at the hearing unless taken before the order for the taking of the deposition issues.

When a deposition is taken upon written interrogatories and cross-interrogatories neither the counsel for the taxpayer nor for the Commissioner, nor any person other than the witness, a stenographic reporter and the officer taking the deposition shall be present at the examination of the witness, which fact shall be certified by the officer taking the deposition who shall in such case propound the interrogatories and cross-interrogatories to the witness in their order and reduce the testimony to writing in the witness's own words.

Depositions obtained in foreign countries must be taken on written interrogatories.

RULE 50.—SETTLEMENT OF FINAL DETERMINATION [1]

When the Board determines the issues in any proceeding and withholds final decision of the deficiency or overpayment for later computation, the parties shall, if they are in agreement as to the amount of the deficiency or overpayment, in accordance with the determination of the Board, file with the Board an original and four copies of a computation showing the amount for entry of final decision forthwith. If the parties are not in agreement as to the amount to be entered in the final decision, either of them may file with the Board a computation of the deficiency or overpayment believed by him to be in accordance with the determination of the Board. The clerk will serve a copy thereof upon the opposite party and will thereupon place the matter upon the day calendar for hearing in due course and give the usual notice. If the opposite party fails to file objection, accompanied by an alternative computation, within 5 days prior to the date of such hearing, or any continuance thereof, the deficiency or overpayment shown in the computation already submitted shall be taken to be correct and decision thereon will be entered. If the parties submit different computations and amounts, they will be afforded an opportunity to be heard thereon on the date fixed, and the Board will determine the correct deficiency or overpayment and enter final decision.

Any hearing under this rule will be confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the determination already made, and no

[1] Amended Apr. 28, 1928.

argument will be heard upon or consideration given to the issues or matters already disposed of by such determination or of any new issues. This rule is not to be regarded as affording an opportunity for rehearing or reconsideration.

RULE 51.—COSTS—PREPARATION OF RECORD ON REVIEW[1]

It shall be the duty of the clerk, immediately after the contents of a record on review have been settled or agreed to, to notify the petitioner of the costs and charges for the preparation, comparison and certification of said record; such charges to be determined in accordance with the provisions of an Act of Congress entitled "An Act to provide fees to be charged by clerks of the district courts of the United States," approved February 11, 1925, 43 Stat. 857–8.

No transcript will be certified and transmitted to the appellate court until the costs and charges therefor have been paid to the Board.

RULE 52.—COSTS—PRINTING OF RECORD ON REVIEW[2]

In each proceeding for review of a decision of the Board by the United States Circuit Court of Appeals for the Second Circuit when review is sought by the Commissioner of Internal Revenue, the clerk of the Board shall, immediately after the contents of the record on review, as required by Rule 35 of the Court, have been settled or agreed upon, make available to the Commissioner, or his counsel, the record of the Board in the proceeding. The Commissioner shall cause the record to be printed. Sixteen copies of the printed record shall be delivered to the clerk of this Board for certification and filing with the clerk of the Circuit Court of Appeals. The clerk of the Board shall serve five copies of the printed record upon counsel for the taxpayer by registered mail.

RULE 60.—FEES AND MILEAGE

The following is from the Revenue Act of 1926:

"SEC. 909. (a) Any witness summoned or whose deposition is taken under section 908 shall receive the same fees and mileage as witnesses in courts of the United States. Such fees and mileage and the expenses of taking any such deposition shall be paid as follows:

"(1) In the case of witnesses for the Commissioner, such payments shall be made by the Secretary out of any moneys appropriated for the collection of internal-revenue taxes, and may be made in advance.

---

[1] Adopted July 2, 1927.

[2] Adopted Dec. 6, 1927.

"(2) In the case of any other witnesses, such payments shall be made, subject to rules prescribed by the Board, by the party at whose instance the witness appears or the deposition is taken.

"(b) This section shall take effect as of June 2, 1924, in the case of fees, mileage, or expenses accrued prior to, but remaining unpaid at the time of, the enactment of the Revenue Act of 1926."

No witness, other than one for the Commissioner, shall be required to testify in any proceeding before this Board until he shall have been tendered the fees and mileage to which he is entitled in accordance with the above provision of law.

RULE 61.—COMPUTATION OF TIME—SUNDAYS AND HOLIDAYS

When the time prescribed by these rules for doing any act expires on a Sunday or a legal holiday in the District of Columbia, such time shall extend to and include the next succeeding day that is not a Sunday or such a legal holiday: *Provided*, That when the time for performing any act is prescribed by statute nothing in these rules shall be deemed to be a limitation or extension of the statutory time fixed.

The following-named days are legal holidays within the District of Columbia:

New Year's Day, January 1 (Sec. 993, Revised Stat. relating to D. C.).

Washington's Birthday, February 22 (Act of January 31, 1879).

Inauguration Day, every fourth year (Act of June 18, 1888).

Decoration Day, May 30 (Act of August 1, 1888).

Fourth of July (Sec. 993, Revised Stat. relating to D. C.).

Labor Day, first Monday in September (Act of June 28, 1894).

Thanksgiving Day, day proclaimed by President (Sec. 993, Revised Stat. relating to D. C.).

Christmas Day, December 25 (Sec. 993, Revised Stat. relating to D. C.).

When legal holidays fall on Sunday the next day shall be a holiday (Act of December 20, 1881).

RULE 62.—SPECIAL ASSESSMENT[1]

(*a*) If some of the issues raised by the petition involve section 327 or section 328 of the Revenue Act of 1918 or of 1921 (or section 210 of the Revenue Act of 1917, as the case may be), and some do not involve such sections, the hearing may, in the discretion of the Board, on motion, be limited in the first instance to trial of the issues which do not involve such sections.

[1] Adopted Dec. 28, 1927.

(*b*) After decision on such other issues, or if no such other issues are raised by the pleadings, a hearing may, in the discretion of the Board, on motion, be had, limited to the trial of the issue whether the petitioner is entitled to have its tax determined as provided in section 328 (or section 210 as the case may be).

(*c*) If the Board decides that the petitioner is entitled to have its tax determined as provided in section 328 (or section 210, as the case may be), the respondent shall within 60 days after such decision file with the Board an original and four copies of a proposed redetermination showing the basis and method of the computation. If, within 20 days after service by the Board upon the petitioner of a copy of such proposed redetermination, the parties are unable to agree upon the amount of tax, either party may move, or the Board may upon its own motion order, that the case be placed upon the day calender for further hearing, at which either party may submit proof of the correct amount of tax and deficiency or overpayment.

(*d*) If from the pleadings or otherwise it appears of record before the Board that the parties agree that petitioner is entitled to have its tax determined as provided in section 328 (or section 210, as the case may be), and the only issue is as to the correct amount of the tax so determined, the case will be placed upon the day calender in due course for hearing, at which either party may submit proof of the correct amount of the tax and deficiency or overpayment.

APPENDIX

FORMS

These forms are subject to amendment as circumstances may render necessary.

No. 1. Application for admission to practice.
No. 2. Petition.
No. 3. Application for subpœna.
No. 4. Subpœna.
No. 5. Application for order to take depositions.
No. 6. Order to take depositions and certificate on return.

(NOTE.—Read Rule 4 of the Rules of Practice of the Board and carefully observe the requirements thereof as to form, size, and style of papers.)

No. 1.—APPLICATION FOR ADMISSION TO PRACTICE

(See Rule 2)

UNITED STATES BOARD OF TAX APPEALS

APPLICATION FOR ADMISSION TO PRACTICE

I, _____, hereby apply for admission to practice before the United States Board of Tax Appeals, and submit the following:

1. I reside at _____ (Street number), _____ (City), _____ (County), _____ (State).

2. My office address is _____ (Street number), _____ (City), _____ (County), _____ (State).

3. I was admitted to the bar of the _____ (Enter name of highest court) Court, of the State of _____, on the _____ day of _____ 192__, and have never been suspended or disbarred from practice before said court or any court of any State or the United States, except as follows: _____

4. I am a member (or associate) of the firm _____.

5. I am a member of _____ (State membership in professional societies)

No. 1.—APPLICATION FOR ADMISSION TO PRACTICE—Continued

Certified Public Accountants will use the following:

I was issued a certificate and authorized to practice as a certified public accountant by the _____ of the State of _____
(Give name of board or commission)
on the _____ day of _____, 192__, and such certificate has never been revoked nor have I been suspended from practice, except as follows:

_____

_____

_____

I am a member of _____
(State names of accountants' societies to which you belong)

_____

_____

and have never been suspended or expelled from any such society or any other recognized society of certified public accountants, except as follows:

_____

_____

_____
(Name of applicant)

STATE OF _____ }
County of _____ } *ss:*

_____, being first duly sworn, says that he is the person named in the foregoing application for admission to practice before the United States Board of Tax Appeals and that the statements of fact therein contained are true.

_____
(Signature of applicant)

Subscribed and sworn to before me this _____ day of _____, 192__.

_____

_____

CERTIFICATE

I, _____
(State whether clerk of court or secretary of State board or commission of accountancy)
hereby certify that _____, the applicant for admission to practice before the United States Board of Tax Appeals, is duly admitted to practice as _____ by the
(State whether attorney or C. P. A.)
_____ of the State of
(State name of court or State board or commission of accountancy)
_____ and that he is now in good standing as such
_____
(State whether attorney or C. P. A.)

_____
(Clerk of court or secretary of State board or commission of accountancy)

Dated _____, 192__.

[SEAL.]

No. 2.—PETITION

(See Rules 4, 5, 6, 7, and 8)

UNITED STATES BOARD OF TAX APPEALS

Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. ----------

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (bureau symbols) dated ----------, 192--, and as a basis of his proceeding alleges as follows:

1. The petitioner is (set forth whether individual, corporation, fiduciary, etc., as provided in Rule 6) with principal office (or residence) at ---------- (Street) ----------, ---------- (City) (State).

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on ----------, 192--.

3. The taxes in controversy are (income, profits, estate, or gift) taxes for the (calendar or fiscal) year 19--- and for ---------- dollars (state as exactly as possible the amount in dispute).

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors: (Enumerate specifically the assignments of error in a concise manner and avoid pleading facts which properly belong in the succeeding paragraph.)

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows: (Here set forth allegations of the facts relied upon—but not the evidence—in orderly and logical sequence, with subparagraphs lettered, so as fully to inform the Board of the issues to be presented and to enable the Commissioner to admit or deny each specific allegation.)

Wherefore, the petitioner prays that this Board may hear the proceeding and (here state the relief desired).

Counsel for Petitioner,

(Post-office address)

STATE OF ----------
County of ---------- } *ss:*

----------, being duly sworn, says that he is the petitioner (if a corporation, or fiduciary, state title of office or trust of person verifying and that he is duly authorized to verify the foregoing petition) above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

Subscribed and sworn to before me this---------- day of----------, 192---.

No. 3.—APPLICATION FOR SUBPŒNA

(See Rule 44)

UNITED STATES BOARD OF TAX APPEALS

----------,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. ----------

APPLICATION FOR SUBPŒNA

To the United States Board of Tax Appeals:

Application is hereby made for the issuance of a subpœna for the attendance before ----------
(The United States Board of Tax Appeals, or the name
----
and official title of the person authorized to take depositions)
at ---------- of the following persons whose oral testimony is desired on behalf of ---------- in the matter of
(Petitioner or respondent)
the tax liability of the above-named petitioner now pending on appeal:

NAME	ADDRESS
----------	----------
----------	----------
----------	----------
----------	----------
----------	----------

Details required under Rule 44:

Dated ----------, 192...

(Signed) ----------

No. 4.—SUBPŒNA

(See Rule 44)

UNITED STATES BOARD OF TAX APPEALS

----------,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. ----------

SUBPŒNA

The President of the United States of America:

To ---------- Greeting.

You are hereby commanded under penalty of law to be and appear in your proper person before the ----------
(United States Board of Tax Appeals
----
or the name and official title of the person authorized to take depositions)

No. 4.—SUBPŒNA—Continued

at _____ on the _____ day of _____, 192__,
at _____ o'clock ____ m., then and there to testify on behalf of
_____ in the matter of the tax liability of _____
(Petitioner or respondent)
now pending before this Board.

You are required to bring with you the following, to wit: _____
_____
_____
_____
_____

By order of the United States Board of Tax Appeals, this _____ day of _____, 192__.

[SEAL.]

_____
(Member)

PROOF OF SERVICE

STATE OF _____ }
County of _____ } *ss:*

_____, being first and duly sworn, says:—I am a citizen of the United States of America, over the age of twenty-one years, and not a party to or in any way interested in the proceeding in which this subpœna was issued.

That on the _____ day of _____, 192__, I served the annexed subpœna on the following witnesses named therein at the places set opposite their respective names, by delivering to and leaving with each of them personally a copy of said subpœna and at the same time exhibiting to each of them this original:

NAME	PLACE OF SERVICE
_____	_____
_____	_____
_____	_____
_____	_____

(For witnesses subpœnaed on behalf of petitioner.)

That at the time of such service I tendered to each of said witnesses the sum of $ _____, the same being the fees and mileage required by Rule 60 of the Rules of Practice of the Board.

_____

Subscribed and sworn to before me
this _____ day of _____, 192__.

_____

No. 5.—APPLICATION FOR ORDER TO TAKE DEPOSITIONS

(See Rules 45, 46, and 47)

UNITED STATES BOARD OF TAX APPEALS

----------, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. ----------

APPLICATION FOR ORDER TO TAKE DEPOSITIONS

To the United States Board of Tax Appeals:

1. Application is hereby made by the above-named ----------
(Petitioner or respondent)
for an order to take the deposition__ of the following-named person__:

	NAME OF WITNESS	POST-OFFICE ADDRESS
(a)	----------	----------
(b)	----------	----------
(c)	----------	----------
(d)	----------	----------

2. It is desired to take the depositions of the persons above named and each of them for the following reasons:

(a) ----------will testify to the following materia matters: ----------

(Set forth briefly the matter upon which said witness will be called to testify)

(b) ----------will testify to the following materia matters: ----------

(c) ----------will testify to the following materia matters: ----------

(d) ----------will testify to the following materia matters: ----------

3. The reasons why ---------- desires to take the
(Petitioner or respondent)
testimony of the above-named persons rather than have them appear personally and testify before the Board are as follows: (State specifically reasons for each witness for whom subpœna is required.)

4. It is desired to take the testimony of ----------
(Names of witnesses)

on the ---------- day of ----------, 192__, at the hour of ------ o'clock ---- m.
(A date sufficiently in advance of the day set for hearing of the proceedings to enable the deposition to be completed and filed with the Board at least 10 days prior to the hearing)

before ---------- in the City of ----------
(State name and title of official)

State of ---------- at Room ----------
(Give number of room, street number, and name of building.)

No. 5.—APPLICATION FOR ORDER TO TAKE DEPOSITIONS—Continued

5. That _____ is a
(Name of official before whom depositions are to be taken)
_____, who has no office connection or business employ-
(Give official title)
ment with the petitioner or his counsel.

Dated _____, 192__.

_____
Counsel for Petitioner.

STATE OF _____ }
County of _____ } *ss:*

_____, being duly sworn, says that the foregoing
(Petitioner or counsel)
application for order to take depositions is made in good faith and for the reasons therein stated and that the same is not made for purposes of delay.

_____

Subscribed and sworn to before me this
_____ day of _____, 192__.

_____

No. 6.—ORDER TO TAKE DEPOSITIONS

(See Rule 45)

UNITED STATES BOARD OF TAX APPEALS

_____
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE
Respondent.
} Docket No. _____

ORDER TO TAKE DEPOSITIONS

On consideration of the application of _____ to take
(Petitioner or respondent)
the testimony by deposition of _____
(Names of witnesses)
_____
residing at _____, alleged to be material witnesses
in this proceeding, at _____
(Room number, street number, and place)
_____ on the _____ day of _____, 192__,
at ____ o'clock __ m., and it appearing therefrom that _____
a _____ of _____ is a person
(Official title) (Address)
authorized to administer oaths under the Revenue Act of 1926, it is by the Board:

ORDERED, that the depositions of the said witnesses above named be taken at _____
(Room number, street number, and place)
_____ commencing on the _____ day of _____, 192__,
at ____ o'clock __ m.

And it is further ORDERED, That the said depositions be taken before _____ of _____, a _____
(Official title)
who is hereby designated by the Board for that purpose.

No. 6.—ORDER TO TAKE DEPOSITIONS—Continued

The said depositions shall be taken and the same returned to this Board in accordance with the rules of the Board.

_____
(Member, United States Board of Tax Appeals)

Dated _____, 192__.
[SEAL.]

CERTIFICATE ON RETURN

(See Rule 46)

I, _____, the person named in the foregoing order to take depositions, hereby certify:

1. I proceeded, on the _____ day of _____, A. D. 192__, at the office of _____, in the city of _____, State of _____, at _____ o'clock, __ m., under the said order and in the presence of _____ and _____, the counsel of the respective parties, to take the following depositions, viz:

_____, a witness produced on behalf of the _____.
(Petitioner or respondent)

_____, a witness produced on behalf of the _____.
(Petitioner or respondent)

_____, a witness produced on behalf of the _____.
(Petitioner or respondent)

That said witness ____ were examined under oath at such times and places as conditions of adjournment required, and that the testimony of said witness __ (or their answers to the interrogatories filed) was taken stenographically and reduced to typewriting by me or under my direction.

2. I further certify that after the said testimony of said witness ____ was reduced to writing the transcript of the testimony was read and signed by said witness ____ in my presence, and that _____ acknowledged
(Each of them or he)
before me that said testimony was in all respects truly and correctly transcribed.

3. I further certify that, after the signing of the deposition in my presence, no alterations or changes were made therein.

4. I have no office connection or business employment with the petitioner or his attorney except that of _____, objection to which was waived
(State connection)
by both the parties to the proceeding.

[SEAL.]

_____
(Signature of person taking deposition)

_____
(Official title)

(NOTE.—This Certificate on Return, when properly executed, and also the Order to Take Depositions, should be attached to and bound with the transcript, preceding the first page thereof. It should then be inclosed in a sealed envelope and addressed to United States Board of Tax Appeals, Earle Building, Washington, D. C. See Rules 45 and 46 of the Rules of Practice and Procedure of the Board as to specific requirements for taking depositions.)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 130.

OLD COLONY TRUST COMPANY, ET AL., *Executors,*

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION OF W. A. SUTHERLAND FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE.

W. A. SUTHERLAND,
Counsel, Amicus Curiae.

SUTHERLAND & TUTTLE,
JOSEPH B. BRENNAN,
Of Counsel.

PEARSON'S, 919 ELEVENTH STREET NORTHWEST

IN THE

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OLD COLONY TRUST COMPANY, ET AL., *Executors,*

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ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May It Please The Court:

The undersigned respectfully moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

W. A. SUTHERLAND,
Counsel, Amicus Curiae.

SUBJECT NDEX.

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IN THE

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MOTION OF W. A. SUTHERLAND FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE.

I.

PRELIMINARY STATEMENT.

We represent a taxpayer whose case was appealed to the Board of Tax Appeals prior to the passage of the Revenue Act of 1926. The hearing was had and decision rendered after the passage of the 1926 Act. The decision was against the taxpayer and the case was appealed to the Cir-

cuit Court of Appeals. The Circuit Court of Appeals rendered judgment sustaining the Board's decision on the ground that taxpayer had not introduced sufficient evidence to sustain its contentions. Petition was made to this court for certiorari and certiorari was denied. Our interest lies in showing that the Circuit Court of Appeals does not have jurisdiction in this class of cases because its judgment does not preclude the taxpayer from claiming a refund and suing therefor, and does not preclude the Commissioner of Internal Revenue—an Executive Officer—from voluntarily granting a refund.

We address ourselves, therefore, to a partial answer to the Court's first question propounded on February 18, 1929:

> "Was there power in Congress to confer jurisdiction upon the Circuit Court of Appeals to review action by the Board of Tax Appeals?"

Our answer to this question relates only to cases appealed to the Board of Tax Appeals prior to the passage of the 1926 Act and in which hearing was had and decision rendered after the passage of the 1926 Act.

We regret that we were called into this matter so late that we have not been able to make the exhaustive research of the authorities, especially as relates to certain broad constitutional questions, which the Court's inquiry in this case presents an opportunity to develop. However, our answer does not require a consideration of these questions. It rests on statutory construction. The only constitutional questions which it involves are beyond dispute. If the Court should, in view of the vast importance of the question, at any time desire a reargument of the matter, we trust that we may be given permission to file another brief going into these other questions.

II.

STATUTES INVOLVED.

The pertinent portions of the Revenue Acts of 1924 and 1926 are set forth in the first supplemental brief of the Commissioner of Internal Revenue. It is unnecessary, therefore, again to set forth these statutes.

III.

ARGUMENT.

Summary of Argument.

1. We concede for purposes of this brief that the Circuit Court of Appeals does have jurisdiction of appeals from the Board of Tax Appeals in cases appealed to the Board subsequent to the passage of the Revenue Act of 1926.

2. The Circuit Court of Appeals does not have jurisdiction of cases appealed to the Board of Tax Appeals prior to the passage of the Revenue Act of 1926, if its judgment may be upset by executive action in allowing claim for refund based upon the same cause of action or by the judgment of another court in an action on a rejected claim for refund.

3. In cases filed with the Board of Tax Appeals prior to the passage of the Revenue Act of 1926, that Act expressly reserves to taxpayer the right to file claim for refund and, if it is rejected, to bring suit thereon, notwithstanding the decision of the Board of Tax Appeals and affirmance by the Circuit Court of Appeals.

4. If the Circuit Court of Appeals' decision were final, it would in many cases be possible for the Commissioner of Internal Revenue to deprive taxpayer of the right to

file claim for refund and sue thereon, in spite of the express guarantee of this right contained in the Revenue Act of 1926.

1. We concede for purposes of this brief that the Circuit Court of Appeals does have jurisdiction of appeals from the Board of Tax Appeals in cases appealed to the board subsequent to the passage of the Revenue Act of 1926.

We agree with the argument in the American Bar Association brief with reference to the constitutionality of the provisions giving jurisdiction to the Circuit Court of Appeals to review decisions of the Board of Tax Appeals in cases filed with the Board subsequent to the passage of the 1926 Act. There the judgment of the Board is final unless appeal is taken to the Circuit Court of Appeals, and the judgment of the Circuit Court of Appeals is final unless certiorari is granted by this court. The Commissioner does not have authority to allow a refund of taxes contrary to the decision of the Board, or if the case is appealed, contrary to the decision of the Court. Nor can the taxpayer in such a situation maintain suit for refund. Under such circumstances the jurisdiction of the Circuit Court of Appeals should certainly be sustained if this Court is to continue to permit appeals from the Federal Trade Commission and the Secretary of Agriculture and the Board of General Appraisers and the like.

The situation where the appeal to the Board of Tax Appeals is taken prior to the passage of the 1926 Act is entirely different.

2. The Circuit Court of Appeals does not have jurisdiction of cases appealed to the Board of Tax Appeals prior to the passage of the Revenue Act of 1926 if its judgment may be upset by executive

ACTION IN ALLOWING CLAIM FOR REFUND BASED UPON THE SAME CAUSE OF ACTION OR BY THE JUDGMENT OF ANOTHER COURT IN AN ACTION ON A REJECTED CLAIM FOR REFUND.

If the judgment of the Circuit Court of Appeals upon appeal from the Board of Tax Appeals is not conclusive of the rights of the parties so that no change can be made in these rights by an executive officer of the Government or by a court in a suit upon a rejected claim for refund, the Circuit Court of Appeals is without jurisdiction. As a matter of constitutional law we do not feel that this requires the citation of authority. The Committee of the American Bar Association in its first brief as amici curiae, attempting to sustain jurisdiction of the Circuit Court of Appeals, make it perfectly clear that they do not question this proposition.

See *Hayburn's Case,* 2 Dallas 409n (1792).
U. S. v. *Ferreira,* 13 How. 40 (1851).
Gordon v. *U. S.,* 2 Wall. 561, 117 U. S. 697 (1865).

In order therefore to show that the Circuit Court of Appeals does not have jurisdiction it is necessary only to show that its judgment does not have such finality as will bar a refund by the Commissioner of Internal Revenue or suit therefor by the taxpayer upon the same cause.

3. IN CASES FILED WITH THE BOARD OF TAX APPEALS PRIOR TO THE PASSAGE OF THE REVENUE ACT OF 1926, THAT ACT EXPRESSLY RESERVES TO TAXPAYER THE RIGHT TO FILE CLAIM FOR REFUND AND BRING SUIT THEREON NOTWITHSTANDING THE DECISION OF THE BOARD OF TAX APPEALS AND AFFIRMANCE BY THE CIRCUIT COURT OF APPEALS.

Prior to the passage of the 1926 Act the decision of the Board of Tax Appeals was not binding upon either party. The Commissioner could bring suit in court to recover any

taxes disallowed by the Board and the taxpayer could bring suit in court to recover any amounts found to be due by the Board and paid by the taxpayer, or the Commissioner could refund to the taxpayer without suit. The Boards' findings were only *prima faice* evidence. The result was that when a taxpayer appealed to the Board of Tax Appeals he did not surrender the right always preserved to him by the Revenue Acts of the United States—even though not required by the Constitution—to file suit against the collector in the district court and have a jury trial on all issues of fact. The Commissioner, if he lost, could bring a suit *de novo* in the District Court.

When Congress came to enact the Revenue Act of 1926 it had come to feel that there was unnecessary duplication of effort where a case was tried, according to legal procedure, in the Board of Tax Apeals and then tried over again in an action in the District Court brought by the losing party. It therefore provided that no claim for refund should ever be filed if the taxpayer, within the sixty days after the receipt from the Commissioner of the notice giving him the right to go to the Board of Tax Appeals, filed appeal with the Board of Tax Appeals. It is not necessary that the case ever be heard. Even if the petition is voluntarily withdrawn by the taxpayer, his rights to a judicial determination of his tax liability is forever barred.

Congress felt it was necessary to provide specially for cases in which the petition was filed before the 1926 Act and the hearing had and the decision rendered thereafter. It might have treated these cases just as it treated those cases in which the hearing was had before the passage of the 1926 Act, leaving the taxpayer and the Commissioner without right of appeal, just as under the 1924 Act. It might have provided that the decision of the Board was final and barred refund and that an appeal was the only remedy. It might possibly have provided that though the decision of

the Board of Tax Appeals was not final, the case could be appealed to the Circuit Court of Appeals and its decision would be final, though there is some doubt as to the constitutionality of such a provision. Congress did not do either of these things, but provided that the only remedy of the Commissioner is by appeal, if he is dissatisfied with the decision, and that the tapayer may appeal or not, as he chooses, but provided that in any event the taxpayer shall not be barred from filing claim for refund. That is tantamount to saying that the decision of the Circuit Court of Appeals is not final; and, as stated above, Congress could not constitutionally provide for an appeal to the Circuit Court of Appeals where that Courts' decision is subject to administrative review, or to be upset by suit upon a rejected claim for refund.

In referring to cases of the character here discussed, Section 283(b) says:

> "In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (j) of this section and *except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284.*

Section 284(d)—which appears in that section of the 1926 Act granting to taxpayers the right to file a claim for refund of all income taxes overpaid—is directed to excepting from the provisions of section 284(a) those cases in which appeal to the Board of Tax Appeals shall operate to bar a claim for refund. The exception, by its express terms, is confined to cases where the taxpayer, "after the

enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed."

It is conceded by all that section 283(b) permits the taxpayer, whose petition is filed with the Board prior to the 1926 Act, to file a claim for refund and to sue thereon, though the Board has rendered a decision against him. It has been contended, however, that section 283(b) is to be construed to provide that if the taxpayer then carries the matter to the Circuit Court of Appeals, the decision of that court is final and bars any claim for refund.

It is respectfully submitted that the language of the section 283(b) does not lend itself to any such interpretation. In the same sentence with the provision which preserves the taxpayer's right to a claim for refund in cases appealed to the Board prior to the 1926 Act by excepting them from the provisions of Section 284(d), we find not only a reference to the jurisdiction of the Board but also to the jurisdiction of the reviewing courts. This same sentence which preserves the right to a refund provides for review by the courts, and does not distinguish cases appealed to the courts from those not so appealed. The language of that paragraph clearly considers both the Board and the Court reviewing the Board's decision as forums in which no determination will be reached which will bar a claim for refund.

This section preserves in clear language the right of the taxpayer filing with the Board prior to the 1926 Act to file claim for refund, although he goes to the Board and carries the Board's decision to the courts for review. It is simply a wishful argument which construes it so as not to allow to the taxpayer the right to file claim for refund and bring suit thereon with the attendant advantages of a jury trial. The language makes absolutely no distinction, so far as the right to claim for refund is concerned, between

a case where appeal has been taken to the Circuit Court of Appeals and one where appeal has not been so taken.

Stress is laid, however, upon the provisions of Section 1003(a) of the 1926 Act which provides that the judgment of the Circuit Court of Appeals on review of decisions of the Board shall be "*final,*" except that it shall be subject to review by the Supreme Court of the United States. Great stress is laid upon the use of the word "*final*" in this Section.

It is respectfully submitted that the word "*final*" as there used has no reference to and does not in any way concern itself with the matter as to whether the judgment of the Circuit Court of Appeals shall be "*final*" in the sense that it will bar a claim for refund in the case of a petition filed with the Board of Tax Appeals prior to the 1926 Act. The word "*final*" is used in Section 1005(a) where it clearly has the same meaning which it has in Section 1003(a). By no stretch of the imagination can the use of the word "*final*" in Section 1005(a) be said to contemplate a bar to a suit for refund where the petition was filed with the Board prior to the 1926 Act. Section 1005(a) provides that the decision of the Board shall become "*final*" when the expiration of the time for filing a petition for review is expired. Clearly, if no petition for review were filed in a case such as we are now discussing there would be a right to file a claim for refund. There is then no reason to attribute to the word "*final,*" in Section 1003(a), a meaning which would bar a claim for refund in the class of cases we are discussing.

Of course it could not be argued that the judgment of the Circuit Court of Appeals, in passing upon a decision of the Board, is final for the reason that the matter there determined could not, on ordinary principles of *res adjudicata,* be relitigated in a subsequent proceeding. Such an argument would assume the jurisdiction of the Circuit Court

of Appeals and the finality of its judgment as against any subsequent claim or suit for refund, whereas this is the very point in issue.

The same reply may be made to the possible suggestion that an amount paid by a taxpayer after a judgment of the Circuit Court of Appeals upon review of the Board's decision cannot be considered an *"overpayment"* within the meaning of section 284(a) because it is made in accordance with a final court decision. This argument again assumes the very point in dispute. If the decision is not a bar to a subsequent claim for refund, it does not prevent a payment from being an *"overpayment"* if it is in excess of the tax properly due.

It is urged in one of the briefs filed with this Court that the exception from the operation of Section 284 (b) contained in Section 283 (b), applies only to issues not actually raised before the Board. But, according to our understanding, it is true (as the author concedes) that all cases heard after the 1926 Act are heard and decided *under exactly the same procedure and on exactly the same basis*, as cases filed after the 1926 Act. We understand that the total tax liability for the year is in issue as much in cases *heard* after the 1926 Act as in those *filed* after the 1926 Act. In all cases *filed* after the 1926 Act all issues with reference to the year's taxes must be raised or the matter becomes *res judicata* just as if they had been raised. What reason is there for saying that Section 283(b) is to be so construed as to relieve from the principle of *res judicata* as to those issues which might have been raised and were not, but does not relieve from that principle as to issues which were raised? We submit that there is nothing to justify such construction of the exception.

It is urged in the brief above referred to that the mere absence of a prohibition against suit in a matter which has

already been litigated gives rise to no affirmative right. This is not the situation which exists under the 1926 Act with reference to petitions filed with the Board prior to its passage. We have in Section 283 (b) an express exception from a prohibition, which prohibition is made applicable to all future cases. This compels the conclusion of the grant of an affirmative right just as if it were expressly stated.

We have construed this statute without reference to the legislative history. We respectfully submit that the language of the statute is too clear to require a consideration of the legislative history. If, however, this Court feels that there is any doubt or ambiguity in the words of the statute this doubt is entirely removed by reference to the report of the Senate Committee which, in reporting Section 283(b) of the Act to the Senate, expressly called attention to the fact that the right to file a claim for refund was sill open after an appeal from the Board's decision to the Circuit Court of Appeals and a review by this Court. The report said:

> "But it should be noted that the taxpayer, despite his appeal to the Board, is not barred from suit for refund. If he takes advantage of the *appeal to the Court it is not likely that he will bring suit for refund after the Supreme Court has decided against him on his appeal from the Board.*"

The Committee would hardly have stated that a taxpayer was "*not likely*" to bring suit for refund, unless it clearly recognized that he had the legal right to sue for refund, notwithstanding the judgment of the Circuit Court of Appeals. It is also clear from the language of the Committee Report that the Committee had in mind the possibility of the same issues which had been tried before the Board being raised in a suit for refund. The decision of the courts on

altogether different issues would not have any great tendency to deter future suits.

4. IF THE CIRCUIT COURT OF APPEAL'S DECISION WERE FINAL IT WOULD IN MANY CASES BE POSSIBLE FOR THE COMMISSIONER OF INTERNAL REVENUE TO DEPRIVE TAXPAYER OF THE RIGHT OF A SUIT UPON CLAIM FOR REFUND IN SPITE OF THE EXPRESS GUARANTEE OF THE REVENUE ACT OF 1926.

In one of the briefs filed with this Court in support of jurisdiction it is admitted that it would not have been fair to deprive the taxpayer who had filed his petition under the 1924 Act of his right to a suit for refund. It was there stated that the *primary purpose* of the Section 283(b) was to permit the taxpayer in this class of cases to exercise his option after the decision by the Board; that is, then to determine whether he preferred to pay the tax and sue for refund or obtain a review in court of the board's decision.

This argument seems to us to overlook the possibility that the Commissioner may himself have the Circuit Court of Appeals review the decision of the Board which may be distasteful to him in certain respects. Section 1001(a) of the 1926 Act gives the Commissioner the same right to a review by the Circuit Court of Appeals as is given to the taxpayer. The taxpayer has no means of preventing the Commissioner seeking such a review. When the Commissioner does secure this review and decision is rendered in favor of the Commissioner and against the taxpayer, will the taxpayer thereby be deprived of the right which Congress took such pains to preserve to him? Or is it to be suggested that the decision of the Circuit Court of Appeals on the review of a decision of the Board of Tax Appeals in a case filed with the Board prior to the 1926 Act is to be final, so as to bar claims or refund, where the appeal is taken by the taxpayer, but is not to be final where the ap-

peal is taken by the Commissioner? We do not believe that anyone would seriously make this suggestion. If the decision of the Circuit Court of Appeals is final in the one case, it is final in the other. If it is final, it lies within the power of the Commissioner in every case where any portion of the decision is against him to render nugatory all the provisions of the Act designed to preserve to the taxpayer his right to file claim for refund and sue thereon.

IV.

CONCLUSION.

It is respectfully submitted in conclusion that Congress clearly provided, in cases of appeal to the Board of Tax Appeals prior to the 1926 Act, that the decision of the Board is not final and that no affirmance of that decision on a review by the Circuit Court of Appeals is final so as to bar claim for refund or suit thereon. There is here presented no case to which the jurisdiction of the Circuit Court of Appeals can extend.

Respectfully submitted,

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